STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2003
v THOMAS E. FLUM Defendant-Appellant.	No. 229084 Genesee Circuit Court LC No. 99-004830

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARY ELIZABETH KEIMER, Defendant-Appellant.	No. 229129 Genesee Circuit Court LC No. 99-004831-FC

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Defendants Thomas E. Flum and Mary Elizabeth Keimer were jointly tried before separate juries for various offenses stemming from the death of Keimer's mother, Bonnie May Burdt, in her Mount Morris Township home on January 27, 1999. In Docket No. 229084, defendant Flum was convicted of second-degree murder, MCL 750.317, first-degree felony murder, MCL 750.316(1)(b), and larceny in a building, MCL 750.360. The latter charge was vacated by the trial court at sentencing as the predicate offense to the felony murder conviction, and the court sentenced Flum as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 60 to 100 years imprisonment for second-degree murder and life without parole for felony murder. In Docket No. 229129, defendant Keimer was found guilty of conspiracy to commit first-degree murder, MCL 750.157a, first-degree premeditated murder, MCL 750.316(1)(a), felony murder, MCL 750.316(1)(b), and larceny in a building, MCL 750.360. Keimer's larceny conviction was vacated by the trial court at sentencing as a predicate offense to the felony murder conviction, and Keimer was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of life imprisonment on the conspiracy conviction and life

without parole for the murder convictions. Both defendants appeal as of right. Their appeals have been consolidated for this Court's consideration.

In Docket No. 229084, we vacate defendant Flum's conviction and sentence for second-degree murder, but affirm his convictions in all other respects. In Docket No. 229129, we affirm defendant Keimer's convictions.

I

Factual Background

For approximately one year before the murder of Bonnie May Burdt, Keimer, her daughter, Nicole Grenier, and the victim all lived together in a house owned by Burdt. Keimer was a habitual drug user who had been in and out of treatment several times. When Keimer's father died, Burdt sold her house in Kewadin, Michigan, and moved back into her house in Mount Morris Township to help Keimer stay off drugs. Keimer was not working at the time, and her income consisted of disability retirement checks from General Motors, her former employer. Keimer had agreed to cash these checks with Burdt and turn the money over to Burdt for safe keeping. Burdt would then pay Keimer a weekly allowance; this arrangement was aimed at keeping Keimer from purchasing drugs. Keimer was apparently drug free from January 1998 until sometime near the end of the year. In September 1998, however, she allegedly stole Burdt's ATM card and began stealing $200-$500 per day from Burdt's bank account to buy drugs. Keimer also allegedly had been intercepting the mail and stealing Burdt's bank statements so that Burdt would not discover the thefts.

Flum met Keimer while both were in drug rehabilitation approximately two years before the murder. Keimer called Flum several times during the two-week period preceding the murder and ultimately wired bus fare money to Flum, who arrived in Flint on the night of January 26, 1999. The murder of Burdt in her house occurred the next day.

The murder was allegedly committed during the course of a larceny of Burdt's property by defendants. The prosecution theorized that while the motive for the larceny was in part to make the murder look like it occurred during a robbery, the murder was also part of a plan by Keimer to steal bank statements and money from Burdt. Several items had been removed from the house to the garage, including a safe containing money that had been in Burdt's possession and control. The prosecution's theory was that Keimer murdered Burdt for her money and that Flum was an active participant in the murder and larceny. The prosecution also argued to the jury, however, that at the very least the evidence proved Flum's guilt as an aider and abettor of these crimes.

Burdt's body was discovered later that day by Nicole Grenier. A liquid toxic chemical had been poured into a plastic bag and secured over Burdt's head by taping the bag around her neck. Burdt was forced to ingest both the toxic chemical and its fumes. The chemical was so caustic that it caused extensive external and internal injuries. Burdt also suffered a number of defensive injuries, all of which were incurred while she was still alive.

Flum was arrested at a nearby motel the next day. The police recovered Flum's fingerprints from several items found in Burdt's car, and shoeprints matching Flum's shoes were

found in Burdt's house and garage. At the motel room, the police seized a purse containing bank statements and other papers belonging to Burdt, as well as blood-stained clothing and other items. The bank statements showed a pattern of $200, $300, and $500 daily withdrawals from Burdt's savings account, reducing the balance from $66,462.87 in October 1998 to $16,787.29 by January 1999. The prosecution also presented evidence that Flum had fresh scratches on his back and that the victim had human blood under her fingernails.

Keimer gave at least two statements to the police in which she denied involvement or knowledge of the murder before finally confessing to the police on January 30, 1999. In her taped confession, which was played to the jury at trial, Keimer stated that she met Flum during drug rehabilitation two years before the murder. On the day before the murder, Keimer and Flum spoke on the telephone, and Keimer arranged for Flum to come from Detroit to Flint by bus. On the night of January 26, 1999, Keimer met Flum at a motel in Mount Morris Township, where they smoked crack cocaine and devised their plan. Keimer acknowledged that they discussed killing Burdt and she knew the outcome of their plan included the murder of her mother. The motive was to prevent Burdt from finding out about Keimer's thefts from Burdt's bank account. Keimer stated that she drove Flum to the house and provided him with the toilet cleaner and tape used to kill Burdt. While Flum was alone in the bedroom with Burdt, Keimer ingested crack cocaine and heroin. She then proceeded to steal money from Burdt's purse and removed bank statements and a $1,495 disability check from the house. The defendants also removed certain items from the house and left them in the garage, including a television, VCR, and Nicole's computer. Keimer then drove Flum back to the motel, where they used drugs.

In two taped interviews with the police, which were played to the jury, Flum gave conflicting statements to the police. After initially denying any knowledge of Burdt's death, Flum ultimately claimed that Keimer killed Burdt. Flum maintained that although he was present when the murder occurred, he did not encourage or participate in the killing and purportedly attempted to intervene. Flum stated that he was asked by Keimer to act as a lookout for her when they first went to Burdt's house. Flum further claimed that at Keimer's request, while she was killing her mother, he moved a homemade safe that supposedly contained $500 or $600 out of the house and into the garage. Flum stated that after they returned to the motel, they purchased drugs with some of the stolen money.

Following an eight-day trial, the juries convicted defendants on the charges set forth above. Both defendants now appeal as of right.

II

Docket No. 229084, Defendant Flum

Defendant Flum first contends there was insufficient evidence to sustain his convictions for first-degree felony murder, second-degree murder, and larceny in a building. We disagree.

In reviewing a sufficiency of the evidence claim, this Court must consider the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the prosecution proved the essential elements of the crimes charged beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make

credibility choices in support of the jury verdict. *Id*. at 400. The scope of review is the same whether the evidence is direct or circumstantial. *Id.* The prosecutor need not negate every reasonable theory consistent with innocence. *Id.*

"Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). To establish that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement. *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999).

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the statute. *Nowack, supra* at 401. The intent requirement for first-degree felony murder is the same as that for second-degree murder, that the perpetrator acted with at least reckless disregard for the high probability that his actions would result in death or serious bodily harm. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993); *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993). The effect of the felony murder law in this state is to "raise what would otherwise be second-degree murder to first-degree murder – for the sole purpose of increasing punishment." *People v Harding*, 443 Mich 693, 711; 506 NW2d 482 (1993) (Brickley, J., joined by Griffin and Mallett, JJ.).

Larceny of any kind is an enumerated felony in the felony murder statute. MCL 750.316(1)(b). The elements of larceny in a building are: (1) the actual or constructive taking of goods or property of another, (2) without the consent and against the will of the owner, (3) a carrying away or asportation of the goods, (4) with felonious intent, (5) the taking having occurred within the confines of the building. MCL 750.360; *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). The murder need not have been contemporaneous with commission of the enumerated felony, as long as the perpetrator intended to commit the underlying felony at the time of the killing. *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998).

The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The requisite malice includes one of three states of mind – the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id*. at 464. Moreover, under an aiding and abetting theory, the prosecution must prove either that the defendant held the requisite intent or had knowledge that the principal had that intent. *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995).

The prosecution's theory at trial was that defendant Flum was an active participant in the premeditated murder of Burdt and the larceny of Burdt's property during the commission of the

murder. The prosecution also argued to the jury that at the very least, the evidence and Flum's statement proved his guilt as an aider and abettor of these crimes.

Defendant does not dispute the first two elements of felony murder, that Burdt was intentionally killed. *Nowack, supra* at 401. Instead, defendant argues that he did not participate or assist in the killing with the requisite *mens rea* to commit second-degree murder and that there was no larceny of the victim's property. Contrary to defendant's position, the prosecution produced sufficient evidence to allow a rational jury to find guilt beyond a reasonable doubt of felony murder, larceny in a building, and second-degree murder and larceny.

First, defendant's statement to the police indicates that he came to Flint from Detroit at Keimer's request and, knowing Keimer's murderous intentions, accompanied her to act as a lookout while Keimer killed Burdt. Acting as a lookout is sufficient assistance to support a conviction on an aiding and abetting theory. *People v Fuller*, 395 Mich 451, 453-454; 236 NW2d 58 (1975); *People v Lyons*, 70 Mich App 615, 618; 247 NW2d 314 (1976). Defendant's statements to the police and the physical evidence directly and inferentially indicated that defendant participated in Burdt's murder with the requisite malice and was more directly involved than he admitted. The fact that Burdt had defensive wounds and human blood under her fingernails and that defendant had fresh scratches on his back further supported a reasonable inference that defendant was an active participant. Even if defendant was not an active participant in Burdt's death, there was ample evidence from which a rational jury could conclude that he assisted Keimer in the murder with knowledge of her intent to do so.

Moreover, defendant concedes there was evidence that he assisted Keimer in removing money from the safe. Defendant also admitted that he and Keimer later purchased drugs with some of that money. The jury could draw the fair inference that the cash defendant and Keimer stole from Burdt's safe actually belonged to Burdt, not Keimer, as defendant has speculated.

In sum, the substance and manner of defendant's statements to the police, the scratches on his back, the bloody clothes, as well as the fact that the victim's property was found in defendant's motel room and his shoeprints were abundant in Burdt's bedroom and throughout the house all give strong support to the inference that he possessed the requisite *mens rea* and participated in the murder of Burdt and the larceny of her property. Defendant's sufficiency of the evidence argument is therefore without merit.

Next, defendant argues that his convictions for felony murder and larceny in a building should be vacated because the jury instructions given by the trial court on the elements of those offenses were deficient, inaccurate, confusing, and misleading. Defendant argues that the court first erred by ruling that felony murder based on a predicate offense of larceny in a building was not a specific intent crime, and, based on this ruling, then improperly instructed the jury that voluntary intoxication was not a defense to felony murder. Among other instructional errors, the court also purportedly gave the jury confusing instructions regarding the specific intent element of that offense by improperly indicating that the only intent necessary for felony murder was the intent to commit larceny in a building.

This Court reviews de novo a defendant's claim of instructional error. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). Jury instructions are reviewed in their entirety to determine whether the trial court committed error requiring reversal. *People v Davis*, 199

Mich App 502, 515; 503 NW2d 457 (1993); *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Jury instructions must include all the elements of the charged offenses and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if somewhat imperfect, instructions do not create error if they fairly present the issues for trial and sufficiently protected the defendant's rights. *People v Tate*, 244 Mich App 553, 568; 624 NW2d 524 (2001); *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

In the instant case, although defendant objected to the manner of the court's instructions, nebulously characterizing them as confusing, defendant did not specifically object to the alleged deficiencies now raised on appeal. Consequently, defendant's unpreserved allegations of instructional error are reviewed for plain error affecting his substantial rights, *Carines*, *supra* at 763-764, and the record reveals no such error or prejudice arising from the instructions given by the trial court.

Our review of the relevant jury instructions indicates that the trial court properly instructed the jury on the elements and requisite intent of the charged offenses. Felony murder is a general intent crime, requiring the mens rea of second-degree murder during the commission of a felony. See *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001); *People v King*, *supra* at 430; *People v Hughey*, 186 Mich App 585, 591; 464 NW2d 914 (1990); *In re Robinson*, 180 Mich App 454, 462; 447 NW2d 765 (1989). When the underlying felony is a specific intent crime, such as larceny, the specific intent of the underlying felony is required, but this does not transform felony murder into a specific intent crime. See *Hughey*, *supra* at 591. Where the defense of intoxication is raised, it does not affect the malice required for felony murder but only applies to the consideration whether the defendant possessed the specific intent required to commit the underlying felony. *Id*. at 590-591 n 1.

Here, reading the trial court's statements in context, it is clear that the court properly explained to the jury that defendant had to have a specific intent to commit the larceny, with the commission of larceny being one of the elements of felony murder. Moreover, after completing its instructions to the jury, the trial court initiated a bench conference with counsel and thereafter again instructed the jury on felony murder, emphasizing that larceny in a building is a specific intent crime and that "in order to prove felony murder, you have to be convinced beyond a reasonable doubt that larceny in a building occurred because that is the predicate felony to felony murder." During their deliberations, the jury sent out several notes requesting further instruction. In response to these questions, the trial court re-instructed the jury on several points, determined that there was no further confusion, and excused the jury to resume their deliberations. The court accurately clarified to the jury that if it did not convict defendant of larceny in a building, it could not convict him of felony murder. Further, the court properly instructed that voluntary intoxication is a defense to the specific intent crime that was the predicate felony but not to the general intent otherwise required to prove felony murder. *King*, *supra* at 428; *Hughey*, *supra* at 590-591 n 1. We conclude that while felony murder is complex, the court's instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights. *Tate*, *supra; Piper*, *supra*.

Defendant next argues that the trial court abused its discretion when it denied his motion to remove a juror who violated the court's instructions by reading a newspaper article about the

case after the trial started, and that, as a result, defendant was denied his right to be tried before a fair and impartial jury.

On the second day of testimony, it came to the attention of the court that a juror (juror No. 9) had read an article about the case from the previous day's newspaper. The juror stated that he did not talk to anyone on the jury about the article and it would not affect his ability to judge the case. He did not recall anything specific from the article and believed it only reported what witnesses had said in their testimony in court. The juror did not recall the article indicating the positions being taken by the prosecutor or either defense attorney. On further questioning by the trial court, the juror stated that he could set aside anything he had read and decide the case on the basis of the evidence admitted at trial. After hearing arguments from counsel, the court denied defendant's request to dismiss the juror on the grounds that the juror had been exposed to the newspaper article, which purportedly contained information inadmissible at trial. The trial court found that the juror did not recall details of the contents of the article and there was no showing that the juror's judgment had been compromised.

A trial court's rulings on challenges for cause based on bias are reviewed by this Court for abuse of discretion. *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000). The trial court's determination regarding a juror's ability to render an impartial verdict, including findings regarding the juror's credibility, is entitled to substantial deference. *People v Johnson*, 245 Mich App 243, 256 n 5; 631 NW2d 1 (2001). "[W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause." *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998).

In this case, defendant has failed to demonstrate any actual prejudice caused by the presence of the juror. Defendant's assertions in this regard are merely conclusory and he cites no specific information in the article which was purportedly prejudicial and inadmissible and which would have caused the juror to be biased against him. Further, the trial court questioned the juror and determined that he was not biased. After allowing substantial deference to the trial court's finding that the juror was credible in his answers and was not unduly influenced by reading the newspaper article, it is clear that the trial court did not abuse its discretion in declining to remove the juror. Cf. *People v Grove*, 455 Mich 439, 475-477; 566 NW2d 547 (1997).

In a similar vein, defendant next alleges that the trial court erred in denying defendant's motion to remove juror No. 2, who allegedly knew codefendant Keimer and had worked with the victim twenty years ago. However, we conclude that the court's refusal to excuse the juror after the trial had already begun was not an abuse of discretion. *Williams, supra; Daoust, supra*. A review of the record indicates that the court questioned the juror in this regard and concluded, based on the interview, that there was no evidence the juror recognized codefendant Keimer or remembered the victim. Defendant has failed to contradict the court's findings by demonstrating either actual prejudice due to the presence of the juror or cause for the juror's removal. *Daoust, supra*.

Next, defendant argues that error requiring reversal occurred because the trial court refused defendant's request for a jury instruction on accessory after the fact. At trial, defendant

maintained that while he was present when the killing occurred, and may have helped Keimer cover up her involvement in the killing by making it look like the killing occurred during a break-in, he did not participate in the killing. Defendant made a timely request for an instruction on accessory after the fact as a lesser included offense of murder. However, the trial court appropriately denied that request on the basis of the Supreme Court's decision in *People v Perry*, 460 Mich 55, 66; 594 NW2d 477 (1999), in which the court held that accessory after the fact was not a cognate offense of murder.

As the prosecution accurately notes, defendant presents a different argument on appeal with regard to the requested instruction than he did at trial; defendant now argues that an accessory after the fact instruction was warranted as a cognate offense of aiding and abetting. Because this issue was not heard by the trial court, it has not been properly preserved for appeal and is forfeited. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). In any event, as our Supreme Court noted in *Perry*, *supra* at 63 n 20, "being an aider and abettor is simply a theory of prosecution, not a separate substantive offense." Thus, defendant's argument in this regard is fatally flawed, and the trial court did not abuse its discretion in refusing to instruct the jury on the offense of accessory after the fact.

Defendant next alleges that his felony murder conviction must be reversed because the trial court gave an erroneous and misleading response to the jury's inquiry regarding whether it had to find defendant guilty of felony murder if it determined that he had committed the offenses of second-degree murder and larceny in a building. Defendant maintains that the court effectively lessened the prosecution's burden of persuasion and allowed it to convict defendant of felony murder without finding that every essential element of that offense had been proven beyond a reasonable doubt. However, a review of the record indicates that the court reasonably interpreted the jury's question and accurately, albeit not artfully, responded with appropriate instructions that clarified the issues for the jury. Moreover, the court was careful in asking the jury if their confusion had been allayed. The jury instructions, when read as a whole, fairly presented the issues to the jury. *Canales*, *supra* at 574. Defendant's argument is therefore without merit.

Finally, defendant argues that his conviction and sentence for second-degree murder must be vacated because the trial court's imposition of separate sentences for both felony murder and second-degree murder, where there was only one death, violates the constitutional prohibition against double punishment. We agree. As this Court stated in *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000),

> The double jeopardy guarantees in the federal and state constitutions protect a defendant from multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 64; 549 NW2d 540 (1996). Multiple murder convictions arising from the death of a single victim violate double jeopardy. *People v Bigelow*, 225 Mich App 806; 571 NW2d 520 (1997), vacated 225 Mich App 806 (1997), reinstated in part 229 Mich App 218, 220; 581 NW2d 744 (1998); *People v Zeitler*, 183 Mich App 68, 71; 454 NW2d 192 (1990). Thus, defendant cannot properly be convicted of both first-degree murder and the lesser included offense of second-degree murder for the death of a single victim.

Accordingly, defendant's conviction and sentence for second-degree murder are vacated. In all other respects, defendant Flum's convictions are affirmed.

III

Docket No. 229129, Defendant Keimer

Defendant Keimer first contends on appeal that the trial court abused its discretion when it failed to excuse certain jurors who had been exposed to prejudicial extraneous matters and would have otherwise been dismissed for cause, thereby depriving defendant of her constitutional right to a fair and impartial jury.

In this case, as in codefendant Flum's case, certain jurors indicated on the second day of testimony that they had read portions or all of a newspaper article about the case. The trial court thoroughly questioned the two jurors to ascertain their impartiality. Counsel for defendant Keimer expressly requested that both jurors remain on the panel and suggested that "this whole thing can be handled through a cautionary instruction." The requested cautionary instruction was given to both juries.

The record makes clear that this issue was waived by defendant, *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000), and in any event, defendant has failed to meet her burden of demonstrating that she was actually prejudiced by the jurors' presence or that the jurors should have been excused for cause. *Daoust*, *supra*. Defendant's related claim challenging the court's failure to excuse another juror who informed the court that he was experiencing personal problems while participating in the trial is similarly flawed. Defendant never sought to excuse the juror and there is no record that the juror was biased or affected in any way by extraneous matters. Defendant's argument in this regard is therefore without merit.

Next, defendant Keimer alleges that the evidence produced at trial was insufficient to sustain her jury convictions of conspiracy to commit first-degree murder, felony murder, and first-degree premeditated murder. We disagree.

In reviewing a sufficiency of the evidence claim, this Court must consider the evidence presented in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the prosecution proved the essential elements of the crimes charged beyond a reasonable doubt. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The reviewing court must draw all reasonable inferences and make credibility choices in support of the jury verdict. *Nowack*, *supra* at 400. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *Carines*, *supra* at 757.

Defendant argues that the prosecution failed to present sufficient evidence that defendant committed felony murder because the predicate felony, larceny in a building, was never proved, and if there was a larceny, it occurred as an afterthought, subsequent to the victim's death. Citing *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992), and *People v Wells*, 102 Mich App 122, 133; 302 NW2d 196 (1980), defendant asserts that the felony murder doctrine will not apply if the intent to steal property of the victim was not formed until after the homicide. Defendant argues that she did not form the intent to steal from Burdt until after the

homicide.

The elements of felony murder and the underlying felony, larceny in a building, are set forth in the discussion of codefendant Flum's sufficiency of the evidence claim, see text, *supra.* The murder need not have been contemporaneous with commission of the enumerated felony, so long as the defendant intended to commit the underlying felony at the time of the killing. *Kelly, supra* at 643; *Brannon, supra* at 125.

In the instant case, the prosecution produced sufficient evidence to allow a rational jury to find guilt beyond a reasonable doubt regarding the charge of felony murder. The evidence admitted at trial established that defendant drove codefendant Flum to the victim's house. She entered the home and distracted Burdt until Flum invaded the living area of the residence through the garage door. Thus, at a minimum, evidence was introduced showing that defendant aided and abetted in the murder by supplying materials used to kill Burdt. There was evidence that the house was ransacked by someone who cared about its contents during the course of the murder or soon thereafter. Defendant admitted in her confession that she took money from Burdt's purse, allowing the jury to reasonably infer that some, if not all, of this money belonged to Burdt. The police observed a safe that had been broken open in the garage, which one could infer from Nicole Grenier's testimony contained cash being kept by Burdt. Moreover, defendant knew that Flum had gone through the house and taken several objects that he had placed in a black bag that he took with him from the residence. Finally, defendant drove the getaway car, drove Flum back to the motel, and then used the money to buy drugs for herself and defendant. In sum, ample evidence was presented from which the jury could have concluded that defendant intended to steal Burdt's money either before or at the time of the murder. Defendant's argument in this regard is therefore without merit.

Defendant further argues that she could not have formed the specific intent to steal due to voluntary drug intoxication Although first-degree felony murder is a general intent crime for which the defense of intoxication may not be asserted, the underlying felony here, larceny, is a specific intent crime with respect to which intoxication may be asserted. *Hughey, supra* at 590; *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992). However, a defense of intoxication is proper only if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent. *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995), modified and remanded 450 Mich 1212 (1995); *King, supra* at 428. The defendant's intent can be inferred from her words and conduct, as well as from facts and circumstances established beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001); *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997); *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

In this case, viewing the above evidence in the light most favorable to the prosecution, a reasonable jury could have concluded that defendant formed the intent to steal Burdt's money either before or at the time of the killing, *Kelly*, *supra* at 643, and that defendant was not intoxicated to the point at which she was incapable of forming the intent to commit the charged crime. *Mills, supra*; *Hughey, supra*. According to defendant's own confession, she and Flum planned Burdt's murder and discussed the underlying motive – obtaining the victim's money – for two days before the murder actually happened. The prosecution presented evidence that defendant conceived a plan to murder her mother, Burdt, with a motive to prevent Burdt from

discovering defendant's ongoing theft of Burdt's money, to secure her inheritance and regain control of her money which she had voluntarily given to Burdt, and to steal yet more money for the immediate need to buy more drugs. She contacted codefendant Flum, convinced him to travel to Flint, presented him with the criminal objective of killing her mother, provided the motive, drove him to and from the crime scene, assisted him in the killing, and stole money from the residence. As defendant acknowledges in her brief on appeal, whether and when defendant formed the requisite intent was a question for the jury to decide. *Brannon*, *supra* at 125. The jury obviously found defendant had the capacity to form and indeed possessed the requisite intent when it found her guilty of felony murder and larceny in a building. Viewed in the light most favorable to the prosecution, ample evidence supports these convictions.

In a related argument, defendant also argues that there was insufficient evidence to sustain her convictions for conspiracy to commit murder and first-degree premeditated murder because she was so overcome by the ingestion of drugs that she was devoid of the ability to formulate the requisite specific intent to be convicted of those offenses.

The offense of first-degree premeditated murder is a specific intent crime and requires the prosecution to prove beyond a reasonable doubt that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *Herndon*, *supra* at 386; *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). To deliberate is to measure and evaluate the major facets of a choice or problem; to premeditate is to think about beforehand. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Kelly*, *supra* at 642; *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995). The prosecutor may use the following four factors to prove premeditation: "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Criminal conspiracy is a specific intent crime which arises from a mutual agreement between two or more parties to do or accomplish a crime or unlawful act. *People v Gilbert*, 183 Mich App 741, 749; 455 NW2d 731 (1990). "To prove a conspiracy to commit murder, it must be established that each of the conspirators have the intent required for murder and, to establish that intent, there must be foreknowledge of that intent." *People v Hamp*, 110 Mich App 92, 103; 312 NW2d 175 (1981). "The crime of conspiracy punishes the 'planning' of the substantive offense; [not] the actual commission of the crime." *Id*. at 103; *Gilbert*, *supra* at 749.

Voluntary intoxication may be a defense to first-degree murder if the intoxication prevents the defendant from premeditating and deliberating. *People v Lavearn*, 201 Mich App 679, 684; 506 NW2d 909 (1993), reversed on other grounds 448 Mich 207 (1995). See also *Mills*, *supra* at 82.

Here, as previously noted, the prosecution presented abundant evidence, including defendant's own confession, that she conceived a plan to murder her mother, Burdt, with a motive to prevent Burdt from discovering defendant's on-going theft of Burdt's money and regain control of her money which she had voluntarily given to Burdt.

As defendant acknowledges, the issue of defendant's intent and whether defendant's

intoxication rendered her incapable of forming the requisite intent is an issue for the jury. *Hughey*, *supra* at 590-591; *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Stinson*, 166 Mich App 455, 476-477; 421 NW2d 200 (1988). The jury was free to infer defendant's specific intent, or her knowledge of Flum's specific intent, from circumstantial evidence. The jury was properly instructed on specific intent and defendant's intoxication defense, and obviously found, in rendering its verdict, that she possessed the requisite intent to commit conspiracy to commit murder and first-degree premeditated murder. Viewed in the light most favorable to the prosecution, the evidence supports defendant's convictions. *Nowack, supra*.

Next, defendant alleges that certain spontaneous statements made by codefendant Flum to the police at the time of his arrest at the motel were improperly admitted into evidence at trial. During the prosecution's case in chief, the prosecutor presented the testimony of a police officer who had assisted in the arrest of codefendant Flum at the motel the day after the murder occurred. The officer testified that while transporting Flum back to the police station, Flum, despite having been given *Miranda* warnings, made statements that he "had nothing to do with what had taken place that day," that it was "Mary Beth's plan," and that she stood to inherit $40,000 to $50,000 if "her mother was out of the way." Over defendant's objection, the trial court admitted the statements as both excited utterances under MRE 803(2) and coconspirator statements under MRE 801(d)(2)(E).

On appeal, defendant argues that the admission of these highly prejudicial statements exonerating Flum and implicating defendant deprived her of a fair trial and denied her the right to confront and cross-examine with regard to the statements. Defendant asserts that the trial court abused its discretion in admitting these statements prior to the introduction of independent proof of a conspiracy and where the statements were not made during the course of and in furtherance of the conspiracy, but long after any conspiracy was over in an effort by Flum to distance himself from any culpability. Defendant further argues that the statements do not fall within the ambit of the excited utterances exception to the hearsay rule because the statements were hearsay, MRE 801(c) and 802, and were not related to a startling event or made under the stress of excitement caused by the event in question, the murder of Burdt. Defendant notes that the "startling event" that the trial court found the statements were occasioned by actually happened some twenty hours before Flum made the statements; in addition, the only startling event, if there was one, was Flum's arrest, not the homicide.

The trial court's decision whether to admit evidence is reviewed by this Court for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). In making the determination whether to admit evidence, the trial court's findings of fact will not be disturbed unless clearly erroneous. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996). However, to the extent defendant's argument implicates her constitutional right to confrontation, we review this issue de novo. *People v Rodriquez*, 251 Mich App 10, 25; 650 NW2d 96 (2002).

The prosecution significantly concedes, and we agree, that Flum's statements do not qualify as admissible statements of a coconspirator under MRE 801(d)(2)(E) because they were not made during and in furtherance of the alleged conspiracy. See, generally, *People v Trilck*, 374 Mich 118, 124-128; 132 NW2d 134 (1965); *People v Cadle*, 204 Mich App 646, 653; 516

NW2d 520 (1994), reversed on other grounds in *Perry*, *supra* at 64; *People v Ayoub*, 150 Mich App 150, 152-153; 387 NW2d 848 (1985). Thus, the question remains whether the statements were properly admitted as excited utterances under MRE 803(2), which defines an excited utterance as any "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." As noted by our Supreme Court in *Smith*, *supra* at 550:

> The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the "sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." [Citation omitted]

For a statement to qualify as an excited utterance, the proponent of the statement must establish that: (1) there was a startling event; and (2) the resulting statement was made while the declarant was under the excitement caused by the event. *Id.; People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). To determine whether the second requirement has been met, the court must inquire whether the statement was made before there was time to contrive and misrepresent, and whether it related to the circumstances of the startling occasion. *Smith*, *supra* 550-551. While the amount of time between the startling event and the statement is a factor to consider, "it is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Id.* at 551. There is no express time limit for excited utterances. *Id*. Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum. *Id*. at 551-552. The trial court's determination whether the declarant was still under the stress of the event is accorded wide discretion. *Id*.

We conclude under the circumstances that the trial court erred in admitting Flum's statements under the excited utterance exception to the hearsay rule. The murder occurred twenty hours before the statements were made, and there was certainly the capacity to fabricate, contrive, and misrepresent. The evidence indicates that after the murder defendants returned to their motel room, used the stolen money to purchase drugs, and then imbibed. It is certainly more likely, as defendant argues, that the startling event in this case was Flum's arrest, not the murder, and that Flum's inhibitions were altered and affected by his drug use. Although the prosecution argues that Flum's drug-altered state actually decreased his opportunity for conscious reflection, the circumstances are highly suspect given the specific nature of Flum's statements implicating defendant and exonerating himself. Consequently, we conclude that the trial court clearly erred in finding that Flum's statements were made while under the prolonged excitement caused by murder and thus admitted the statements pursuant to the excited utterance exception to the hearsay rule, MRE 803(2).

However, in light of the fact that defendant's constitutional right to confrontation is involved, any error must be examined to determine whether it is harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994); *Smith*, *supra* at 690; *People v Watson*, 245 Mich App 572, 585; 629 NW2d 411 (2001). A preserved, nonstructural constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Mass*, 464

Mich 615, 640 n 29; 628 NW2d 540 (2001); *Carines, supra* at 774. This Court should consider the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *Watson, supra* at 585.

In this case, Flum's statements were entirely cumulative of the evidence presented by defendant herself in her confession, wherein she confessed her part in the conspiracy and murder. Moreover, as the prosecution argues, there was no harm in defendant's inability to cross-examine Flum regarding these statements. The first two statements were actually rebutted by the prosecution's theory – that Flum was involved in the murder and that it was not all defendant's plan, it was a shared plan. Furthermore, the final statement that the codefendants had discussed the motive for the crime was directly corroborated and cumulative of defendant's own statement. It was irrelevant who devised the plan and the motive, as defendant acknowledged sharing both with Flum. Finally, in light of the overwhelming evidence of defendant's guilt, the error in the admission of Flum's statements was harmless beyond a reasonable doubt. *Smith, supra* at 555; *Watson, supra* at 585.

We have reviewed defendant's remaining appellate claims alleging prosecutorial misconduct and instructional error and find these issues to be without merit.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Hilda R. Gage